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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-668

PEDRO RIVERA,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

HENRY ROTHBLATT
Attorney for Petitioner
232 West End Avenue
New York, New York 10023
212 787-7001

MONTE ENGLER
Of Counsel

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PEDRO RIVERA,

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UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled case on the 16th day of July 1971, which affirmed a judgment of conviction upon the verdict of a jury before the Honorable Edward Weinfeld in the United States District Court for the Southern District of New York.

Petitioner was convicted of two counts of interstate travel in aid of unlawful activities and one count of conspiracy to commit the same in violation of 18 U.S.C. 1952 and 18 U.S.C. 371.

The Opinion Below

The opinion of Circuit Judge Smith, Circuit Court of Appeals for the Second Circuit, in this case has not yet been reported, but it is set forth in Appendix A, *infra* page A1.

Jurisdiction

The Judgment of the Circuit Court of Appeals for the Second Circuit was entered on the 16th day of July 1971. Petition for reargument to that Court was denied on the 29 day of October 1971. No requests have been made for extensions of time to file this petition. Jurisdiction of this Court is invoked under Title 28, Section 1254(1), United States Code.

Questions Presented

1. Whether the Circuit Court of Appeals erred by holding that the interstate travel of Juan Nieves Monserrat, the purported victim of extortion by the Appellant and his alleged co-conspirators, constituted a sufficient basis to justify a conviction for violation of the Travel Act (18 U.S.C. §1952).

2. Whether the Circuit Court of Appeals erred in sanctioning the District Judge's ruling on a motion to sever Appellant's trial where the joinder of the defendants effectively precluded Appellant's counsel from either calling to the stand the only persons who could corroborate the Appellant's freely given testimony or from commenting upon the silence of those same persons.

Statutes Involved

18 U.S.C. §371—Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any

purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum provided for such misdemeanor.

18 U.S.C. §1952—Interstate and foreign travel or transportation in aid of racketeering enterprises

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

(3) otherwise promote, manage, establish, carry on or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2)

extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

(c) Investigations of violations under this section involving liquor or narcotics shall be conducted under the supervision of the Secretary of the Treasury.

18 U.S.C. §2—Principals

(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal. June 25, 1948, c. 645, 62 Stat. 684; Oct. 31, 1951, c. 655, § 17b, 65 Stat. 717.

Statement of the Case

On December 18, 1970, upon the verdict of a jury before the Honorable Edward Weinfeld in the United States District Court for the Southern District of New York, a judgment of conviction was entered against Pedro Rivera on two counts of causing interstate travel in aid of unlawful activity and one count of conspiracy to commit the same. Appellant was sentenced on February 2, 1971 to eighteen months confinement and has been since free on bail pending appeal. On July 16, 1971, the United States Court of Appeals affirmed the judgment of the District Court. Petition for reargument, submitted on July 20, 1971, was denied on October 29, 1971.

A brief synopsis of the developed facts of the case necessary for disposition of the issues raised herein is set forth below.

The operative facts surrounding the instant case arise from a gambling operation centered and operating in New York City. By his own admission at trial, the Appellant Rivera was involved in this policy (numbers) operation as the "supervisor" of several persons who collected bets.

During the early part of December 1969, Appellant was informed by his superiors in the gambling hierarchy that two collectors, Juan Nieves Monserrat (hereinafter referred to as Nieves) and Thomas Alvarez, were suspected of cheating the operation. Pursuant to the orders of his superiors, Appellant informed Nieves and Alvarez that Raymond Marquez (a codefendant and the apparent head of the operation) desired to see them about the allegation. Appellant drove the two men, who came willingly, to the meeting.

There is some dispute concerning precisely what occurred at the meeting, especially with regard to the ostensible existence of threats against Nieves and Alvarez aimed at seeking recovery of the money which the two had allegedly wrongfully obtained from the operation. Nieves told Raymond that he had several days earlier sent a large sum of money to Puerto Rico and there is dispute in the evidence concerning whether Nieves was told to go to Puerto Rico to retrieve the money or whether he was merely told to return the sum in question, regardless of where he got it. It is clear that any such threats were made by someone other than the Appellant.

The following day, however, the Appellant did collect money from Nieves and Alvarez. Shortly thereafter, Nieves flew to Puerto Rico and returned with a large sum of money.

Met by FBI agents at the airport upon his return, Nieves was the next day told by the agents to call the Appellant and inform him that he (Nieves) had money for Raymond. He did so, whereupon Appellant advised him to bring the money to Raymond.

FBI agents drove Nieves to Raymond's place of business where the money was allegedly handed over to Raymond. Shortly thereafter, FBI agents entered the room and arrested those present. The money was not recovered, having been allegedly transferred by Raymond to one Al Carrion (an alleged conspirator in the Third Count) who was no longer present at the time of the arrests.

The theory of the Government, as pertains to the Appellant, is that he was an integral member of a conspiracy which aimed at extorting money from Nieves and which caused Nieves to travel in interstate commerce to distribute proceeds of the New York policy operation. Appellant's position at trial, reasserted herein, is that he did not participate in any such conspiracy and that he neither extorted money from Nieves nor caused him to travel in interstate commerce as alleged.

Reasons for Granting the Writ

1. Question One relates to the propriety of founding a federal conviction upon the tenuous basis that the victim of a purported extortion, entirely local in nature, fortui-

tously travels in interstate commerce as a result of such extortion.[1]

For purposes of the present application, we assume that the Appellant was in fact knowingly instrumental in persuading Nieves to return the money that he was suspected of having converted to his own use at the expense of the numbers operation. Such fact does not, however, we submit, justify the assertion of federal jurisdiction in what was totally a local gambling operation.

Though Nieves related that he was told to go to Puerto Rico to retrieve the money which he sent there, the Appellant testified that Raymond's concern was merely to get the money back, regardless of its location. (Appendix E, pp. A15) The latter version of the threat makes decidedly more sense in that it seems incredible that one seeking a certain amount of money under such circumstances would care about its source.

Regardless, however, it remains eminently clear that the trip to Puerto Rico was merely fortuitously related to the State offense. As was noted by the Appellate below, had Nieves not sent the money to Puerto Rico just days before the "threat" was made by Raymond, there could be no pretense of injecting federal jurisdiction into this case. The trip was but an incidental offshoot of the apparent state offense.

In a recent decision dealing with the breadth of the Travel Act, this Honorable Court determined that Congress did not intend that interstate travel by mere customers of

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[1] The issue was presented to the Circuit Court as an integral part of the Appellant's attack upon the sufficiency of the evidence of conspiracy (Appendix D, pp. A 12).

a gambling establishment should violate that statute. *Rewis* v. *U.S.*, U.S. , 28 L. Ed. 2d 493, 91 S. Ct. (1971). In so holding, Your Honors stated:

> Legislative history of the Act is limited, but does reveal that §1952 was aimed primarily at organized crime and, *more specifically, at persons who reside in one State while operating or managing illegal activities located in another.* U.S. at , 28 L. Ed. 2d at 496. (Emphasis added)

Certainly, prosecution of this Appellant for the activities alleged in the indictment *sub judice* was not consonant with such a goal. Especially is this so in light of Your Honors' further language in *Rewis*, 28 L. Ed. 2d at 497:

> [A]mbiguity concerning the ambit of criminal statutes should be resolved in favor of lenity, *Bell* v. *United States*, 394 U.S. 81, 83, 99 L. Ed. 905, 910, 75 S. Ct. 620 (1955).

The Circuit Court, below, in rejecting the Appellant's contention, placed great reliance upon the decision of the Third Circuit in *United States* v. *De Cavalcante*, 44 F. 2d 1264 (3 Cir. 1971). The Court below read *De Cavalcante* as holding that "[S]ection 1952 is properly invoked where the only interstate travel is by the victim of an extortion scheme." (Appendix A, p. A6) While the ultimate result of *De Cavalcante* may properly be so read, we submit that a complete reading of the case creates more than a modicum of confusion which can be clarified only by a definitive pronouncement from this Honorable Court.

Thus, for example, speaking of the interstate travel by victims of extortion, the Court stated, "Standing alone, §1952 is *not* violated by such travel." (Emphasis added).

The Court appears to reach its ultimate result, after a brief discourse about the Government's tactic of utilizing the language of 18 U.S.C. §2 (aiding and abetting), based upon the use of the word "causes" in the statute. The Court thus concludes that "[U]se of the word 'causes' in the statute conveys an intent sufficiently broad to encompass not only voluntary acts of true agents, but also the involuntary acts of victims." 440 F. 2d at 1269. Parenthetically, and almost apologetically, the Court immediately thereafter notes that the Government has pointed to not one case in which actions of a victim were alleged to provide an element of an offense charged under §1952.

We note, further, that the fact pattern in *De Cavalcante* reveals that the extortion there was more a continued extortionate scheme by members of organized crime, as opposed to the one-time event depicted in the case at bar. It is at least perhaps arguable, therefore, that federal prosecution therein did comport with the aim of Congress in enacting §1952, a claim that does not bear scrutiny in the Appellant's case.

In short, we urge that reliance upon *De Cavalcante* for affirmance of the case *sub judice* is too myopic. We submit that that case was wrongly decided and that the precedent thereof, followed by the Court's decision below, has tended to allow a dangerous usurpation by federal authorities of power that properly rests in the hands of local state authorities. It was not the purpose of Congress, we believe, to allow the assertion of federal jurisdiction in a case such as this. Section 1952 contemplates, properly, a significant relationship between the unlawful activity and the inter-

state commerce.[2] See, e.g., *Rewis* v. *U.S.*, *supra*; *U.S.* v. *Botticello*, 422 F. 2d 832 (2d Cir. 1970); *U.S.* v. *Hawthorne*, 356 F. 2d 740 (4th Cir. 1966), cert. denied, 384 U.S. 908 (1966). We do not believe Congress to have contemplated federal jurisdiction over one so far removed from the interstate commerce as was the Appellant herein.

This Honorable Court is respectfully requested to act in the instant case lest the decision of the Court below be regarded as proper grounds for the invocation of federal jurisdiction where none was intended.

2. Question Two deals directly with the propriety of the trial court's denial of Appellant's attempts to have his case severed from that of his co-conspirators and codefendants. Concurrently, the question deals with the right of counsel to attempt to persuade a jury that certain inferences may, under certain circumstances, be validly drawn from the silence of an individual, not a defendant.

Prior to the outset of trial, the Appellant Rivera moved to have his case severed from that of his alleged co-conspirators and codefendants. The essential basis upon which the Appellant relied in support of his motion was his inability to compel his codefendants to take the stand.

This motion having been denied, Appellant filed a subsequent motion for an order *in limine* permitting his counsel to comment upon the failure of the Appellant Rivera's codefendants to testify, should they so refuse. In the alternative, recognizing that such an order would serve to

[2] Assuming, *arguendo*, that the statute contemplated no such relationship, serious questions of constitutional dimension would obviously be raised with regard to the authority of Congress to assert Federal jurisdiction over offenses of a strictly local nature.

derogate the right of such codefendants to remain silent, the Appellant opened anew his request for a severance. This motion was denied by the trial judge in a 15-page opinion, copies of which are before this Honorable Court as part of the transmitted certified record.

We respectfully urge that the motion for severance, in either instance, should have been granted. In so doing, we reassert our reliance upon the case of *De Luna* v. *United States,* 308 F. 2d 140 (1962) wherein it was asserted at 141:

> In a criminal trial in a federal court an accused has a constitutionally guaranteed right of silence free from prejudicial comments, even when they come only from a co-defendant's attorney. If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendants be tried separately.
>
> See also *United States* v. *Echeles,* 352 F. 2d 892 (7th Cir. 1965).

De Luna has, as might be expected, engendered considerable debate. Subsequent cases dealing with the issue are well-reviewed in the opinion of the trial judge below, denying appellant's motion and there is no necessity to burden this Honorable Court with repetitious citation. The Ninth Circuit has recently well summed up the general reaction of the courts to *De Luna,* and we are disposed to accept that summation as a fair one:

> The concurring opinion in *De Luna* and subsequent decisions in the Fifth Circuit [citing case] and others which have considered the problem [citing cases], have declined to adopt an absolute rule of severance of joint defendants where one desires to comment

> on the other's refusal to testify. Recognizing the procedural problems inherent in a *per se* rule of severance [citing concurring opinion of Judge Bell in *De Luna,* 308 F. 2d at 156], a defendant who has been denied the opportunity to comment on his co-defendant's silence must demonstrate probable prejudice in the presentation of his defenses to the trier of fact in order to claim a right to severance . . . . Unless a defendant can show that his defense probably would have benefited from commenting on a co-defendant's refusal to testify, denial of the motion to sever is not prejudicial.
>
> *United States* v. *De La Cruz Bellinger,* 422 F. 2d 723 (9th Cir. 1970), cert. denied, 398 U.S. 942 (1970).

It is clear that a defendant in a criminal trial cannot be compelled to take the stand and it is equally clear that comment upon his failure to do so is highly improper. *Griffin* v. *California,* 380 U.S. 609, 14 L. Ed. 2d 106, 85 S. Ct. 1229 (1965). It matters not, moreover, whether such comment is made by the prosecutor or by counsel for a codefendant. *U. S.* v. *Echeles, supra,* 352 F. 2d at 897 (citing 8 *Wigmore on Evidence* 410 [Claim of Privilege]).

Appellant has no quarrel with the salutary rule prohibiting comment upon the silence of an accused. That rule is founded upon the well-grounded rationale that the invocation of a constitutional privilege ought to be no grounds for the inference of guilt, lest the privilege become absolutely meaningless and, indeed, a liability to he who invokes it. *See,* e.g., *Grunewald* v. *U.S.,* 353 U.S. 391, 1 L. Ed. 2d 931, 77 S. Ct. 963 (1957); *Johnson* v. *U.S.,* 318 U.S. 189, 87 L. Ed. 704, 63 S. Ct. 549 (1943).

We submit, however, that there is not the same protective rationale behind a rule which prohibits counsel from commenting upon the silence of a *witness* who is called to the stand and chooses not to testify. In a criminal action, the rule protecting the defendant is, we urge, aimed at assuring that he is not convicted of an offense because he has chosen to rely upon a constitutionally granted right. Similarly, comment upon the silence of a party to a civil action is prohibited lest the party be deprived of a legal right or interest because of such reliance. A witness at a trial, however, stands to lose no legal right or protection if his silence is commented upon. Balancing this fact against the interest of an accused in urging all fair inferences from the testimony and conduct of witnesses at his trial, the latter must prevail.

We respectfully disagree with the opinion of the trial court that the invocation of the right to silence permits of no inference whatsoever. The fact of silence is, quite patently, a fact from which various logical, albeit not legal, inferences can be drawn. Wigmore recognizes the possible significance of silence as a basis for unfavorable inference: "A failure to assert a fact, when it would have been natural to assert it, amounts in effect to an assertion of the non-existence of the fact." 3A Wigmore, *Evidence,* §1042 (Chadbourn Rev. 1970).

The Appellant testified quite freely and, due to the rulings of the trial court, was effectively precluded from calling to the stand the only persons, apart from the ostensible victims of the offense, who were in a position to corroborate his testimony. Had they been called, at a separate trial, it is quite possible that they would have testified,

especially had they been already tried. The jury would then have had crucial additional information which would have aided them in their quest for truth.

Had the witnesses chosen not to testify, counsel for the defendant could have urged the jury to draw a given inference from such silence without concurrently placing in jeopardy any legal right or interest of the witness. The prosecution would certainly be then free to argue that the urged inference is illogical or improper. The issue would then, properly, have been in the hands of the jury which would have at least had the opportunity to observe the witness on the stand, a well-recognized asset in the pursuit of truth.

By denying Appellant's motions regarding severance and by further prohibiting counsel from commenting upon the silence of the Appellant's co-conspirators, the trial court placed the Appellant in an impossible situation and denied his counsel the opportunity to defend the case as he saw fit.

In *De Luna* v. *U.S., supra,* the Fifth Circuit indicated quite clearly its belief in the position which Appellant urges upon this Honorable Court. Furthermore, the Seventh Circuit has seemingly accepted the referenced language in *De Luna* (*U. S.* v. *Echeles, supra,* p. 11), despite the difference in factual context properly pointed to by the trial court in its learned opinion (n. 7). On the other hand, as also pointed out by the trial court, the Sixth Circuit has specifically rejected the rationale of *De Luna. U. S.* v. *McKinney,* 379 F. 2d 265 (6 Cir. 1967).

Thus, this Honorable Court is faced with an apparent conflict among the circuits on a point of law which has far-reaching implications for the administration of criminal

justice. Once again, only a definitive exposition of the correct principle by this Honorable Court can serve to guide counsel and judges alike in future cases where similar matters arise.

CONCLUSION

The issues above discussed are, it is submitted, of sufficient substantiality to require a review by the United States Supreme Court.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

HENRY ROTHBLATT
Attorney for Petitioner

MONTE ENGLER
Of Counsel

APPENDIX A

Opinion of the United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 968, 969, 970—September Term, 1970.

(Argued June 2, 1971 Decided July 16, 1971.)

Docket Nos. 71-1223, 71-1246, 71-1250

UNITED STATES OF AMERICA,

Appellee,

—v.—

RAYMOND MARQUEZ, a/k/a "Spanish Raymond," ANTHONY ANGELET and PEDRO RIVERA, a/k/a "Pete Russo,"

Appellants.

Before:

CLARK, *Associate Justice,** SMITH, *Circuit Judge,* and ZAVATT, *District Judge.***

Appeal from convictions on charges of interstate and foreign travel in aid of racketeering enterprises and conspiracy to do so, 18 U.S.C. §§1952 and 371, in the United

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* Retired Associate Justice of the Supreme Court, sitting by designation.

** Senior District Judge for the Eastern District of New York, sitting by designation.

States District Court for the Southern District of New York, Edward Weinfeld, *Judge*. Affirmed.

NANCY ROSNER, New York, N. Y. (Edmund Allen Rosner, New York, N. Y., of counsel), *for Appellant Marquez.*

JOSEPH I. STONE, New York, N. Y. (Selig Lenefsky, New York, N. Y., of counsel), *for Appellant Angelet.*

HENRY B. ROTHBLATT, New York, N. Y. (Monte Engler, New York, N. Y., of counsel), *for Appellant Rivera.*

THOMAS J. FITZPATRICK, Asst. U. S. Attorney (Whitney North Seymour, Jr., U. S. Attorney for the Southern District of New York, Allan A. Tuttle, Asst. U. S. Attorney, of counsel), *for Appellee.*

SMITH, *Circuit Judge*:

This is an appeal from the United States District Court for the Southern District of New York (Edward Weinfeld, *Judge*) from a judgment of conviction entered against Raymond Marquez, Anthony Angelet, and Pedro Rivera for violations of 18 U.S.C. §1952 and 18 U.S.C. §371.[1]

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[1] 18 U.S.C. § 1952:

(a) Whoever travels in interstate or foreign commerce or uses any facility in interstate or foreign commerce, including the mail, with intent to—

(1) distribute the proceeds of any unlawful activity; or

(2) commit any crime of violence to further any unlawful activity; or

Appellants Marquez and Angelet were sentenced to concurrent terms of three years imprisonment on each count, and Rivera to eighteen months.

The government's basic contention is that Marquez, who controlled a numbers operation in Harlem, forced one of his messengers, Juan Nieves Monserrat (hereinafter "Nieves"), to travel to Puerto Rico to secure funds to be paid to appellants pursuant to an extortion conspiracy. Marquez was alleged to have accomplished this by means of threats against Nieves and his father-in-law Tomas Alvarez.

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(3) otherwise promote, manage, establish, carry on, or facilitate the promotion, management, establishment, or carrying on, of any unlawful activity,

and thereafter performs or attempts to perform any of the acts specified in subparagraphs (1), (2), and (3), shall be fined not more than $10,000 or imprisoned for not more than five years, or both.

(b) As used in this section "unlawful activity" means (1) any business enterprise involving gambling, liquor on which the Federal excise tax has not been paid, narcotics, or prostitution offenses in violation of the laws of the State in which they are committed or of the United States, or (2) extortion, bribery, or arson in violation of the laws of the State in which committed or of the United States.

18 U.S.C. §371:

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

On December 7, 1969 Rivera, who was also an employee of Marquez in the policy operation, informed Nieves that he had been accused of cheating on the numbers operation and that Marquez wanted to see him about it. The following day Rivera drove Nieves and his father-in-law to the Caribe Florist Shop which served as the "bank" for the policy operation. There Marquez took Nieves into a back room where the appellant Angelet was waiting and accused Nieves of cheating the operation by betting for himself after part of the daily winning number had already been determined.[2] The two men demanded that Nieves pay them $14,000. Nieves informed them that all the money he had (about $7,300) was in Puerto Rico. He was instructed to go there and get it. During this meeting physical threats were made by Angelet against both Nieves and his father-in-law. Sometime after the conversation began Rivera entered the room. There is conflicting testimony as to whether he came in before or after the threats were made by Angelet.

The next day Rivera went to the Alvarez home and collected $1,000. He also collected $700-800 from Nieves. Later that same day Nieves flew to Puerto Rico and retrieved $7,435.00, returning to New York on the following day.

When Nieves stepped off the plane at Kennedy Airport he was met by agents of the F.B.I. who told him that they knew of his problems with Marquez. Nieves agreed to cooperate with the agents and after detailing the entire

[2] The winning number was determined by the total amount bet at a particular race track on that particular day.

story was allowed to return home. On the following day he returned to the F.B.I. headquarters and called Rivera to report that he had the money. Rivera instructed him to bring it to the flower shop where "Raymond" would be waiting. Nieves took the money to the shop and gave it to Marquez. The F.B.I. then entered the shop and arrested Marquez. Rivera and Angelet were later taken into custody.

The appellants raise a number of different allegations of error, none of which have any merit. Marquez contends that the money which Nieves obtained in Puerto Rico did not constitute the "proceeds of an unlawful activity" as required by the statute. This argument was not raised below, and the appellant is thus precluded from arguing it for the first time here. *United States* v. *Indiviglio*, 352 F.2d 276 (2d Cir. 1965), *cert. denied*, 383 U.S. 907 (1966). In any case, the government contends quite correctly that the question is not whether Nieves in acting as a messenger for the numbers operation had himself obtained the money illegally, but rather that he was ordered to Puerto Rico to obtain the proceeds of what was clearly an illegal operation carried on by the appellants.

Marquez next alleges that the trial court erred by not charging the jury that it must find that the defendants had committed acts in furtherance of the conspiracy following Nieves' return from Puerto Rico. Judge Weinfeld, however, in discussing the third element of the offense specifically charged that the jury must find that "at a time subsequent to such interstate or foreign travel, the defendant performed or attempted to perform one or more acts to

promote, carry on, or facilitate the promotion or carrying on of the unlawful activity of extortion." The portion of the charge to which the appellant takes exception related to the intent element of the offense which, of course, required only that the government show that at some time during the conspiracy the defendants had an intent to cause interstate travel for purposes of extortion.

The appellants next argue that the travel to Puerto Rico, since it was not undertaken either by a defendant or a co-conspirator, did not come within the terms of the statute. The appellants principally rely on the Supreme Court's recent decision in *Rewis* v. *United States*, 39 U.S.L.W. 4363, 4365 (April 5, 1971), where the Court held that section 1952 was not intended to apply in a case where the owners of a Florida gambling operation were convicted on the theory that they had caused the unlawful interstate travel of their patrons. The Court went on to note, however, that "[t]here are cases in which the federal courts have correctly applied §1952 to those individuals whose agents or employees cross state lines in furtherance of illegal activity. *United States* v. *Chambers*, 382 F.2d 910, 913-914 (6 Cir. 1967); *United States* v. *Barrow*, 363 F.2d 62, 64-65 (3 Cir. 1966), *cert. denied*, 385 U.S. 1001 (1967); *United States* v. *Zizzo*, 338 F.2d 577, 580 (7 Cir. 1964), *cert. denied*, 381 U.S. 915 (1965)." The Third Circuit has recently specifically held that section 1952 is properly invoked where the only interstate travel is by the victim of an extortion scheme. *United States* v. *DeCavalcante*, —— F.2d —— (3 Cir. 1971) (Slip Op. filed March 10, 1971).

Angelet and Rivera contend that there is insufficient evidence of their participation in the conspiracy. Rivera

clearly participated in the events of the conspiracy from beginning to end. He initially informed Nieves that he was accused of cheating. He accompanied Nieves to the meeting with Marquez. He participated in at least part of the conversation in which Nieves and Alvarez were threatened. He instructed Nieves to bring the money to the flower shop after he returned from Puerto Rico. There was, therefore, more than sufficient evidence to link Rivera to the conspiracy.

Angelet's participation is equally well established. He participated in the meeting with Marquez, Nieves and Alvarez. He used obscene and threatening language with Nieves, and he threatened Alvarez with physical injury. In addition, he appeared at the flower shop when Nieves delivered the money.

Marquez next alleges that it was error to permit some members of the jury to take notes during the trial and later use them in the course of their deliberations without any special instructions as to their use or without permiting defense counsel to inspect them. It has been well established in this circuit that it is within the trial court's discretion to allow the jury to take notes. The appellant has suggested no reason why this should be reconsidered. *United States* v. *Chiarella*, 184 F.2d 903, 907 (2d Cir. 1950).

Finally Rivera argues that his trial should have been severed from that of his co-defendants in order that he might comment on their refusal or failure to testify. Rivera bases this contention on dictum found in the Fifth Circuit's opinion in *DeLuna* v. *United States*, 308 F.2d 140 (1962), where the court noted:

> If an attorney's duty to his client should require him to draw the jury's attention to the possible inference of guilt from a co-defendant's silence, the trial judge's duty is to order that the defendant be tried separately. 308 F.2d at 141.

Judge Weinfeld filed a typically exhaustive memorandum opinion on this question and based his holding on alternative grounds. He first found that Rivera had put forward no argument which showed that his defense was in any way inconsistent with or antagonistic to that of his co-defendants.[3] He went on to find that in any event *DeLuna's* dicta should not be followed. He noted that it had not found favor with those courts which have considered it and it had been specifically rejected by at least one court of appeals. *United States* v. *McKinney*, 379 F.2d 259, 265 (6 Cir. 1967). He concluded that if no adverse inference could be drawn against a defendant or a witness who exercised his Fifth Amendment privilege, by the same token no "inference of innocence can be drawn in favor of a defendant who does testify because of a witness' or co-defendant's refusal to testify."

We are of the view that Rivera has failed to show sufficient inconsistency in his defense to justify a severance and therefore do not find it necessary now to consider the question raised by *DeLuna*.

The judgment of the district court is affirmed.

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[3] See, *United States* v. *Caci*, 401 F.2d 664, 672 (2d Cir. 1968), *cert. denied as to defendants Caci and Cino*, 394 U.S. 917, *rev'd on other grounds as to defendants Natarelli and Bandacci*, 394 U.S. 310 (1969).

APPENDIX B

Judgment of the United States Court of Appeals
Excerpts from Trial Record

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the sixteenth day of July one thousand nine hundred and seventy-one.

Present:

HON. TOM C. CLARK,
Associate Justice

HON. J. JOSEPH SMITH,
Circuit Judge

HON. JOSEPH C. ZAVATT,
District Judge

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

—v.—

RAYMOND MARQUEZ, a/k/a "Spanish Raymond" and ANTHONY ANGELET and PEDRO RIVERA a/k/a "Pete Russo".
Defendants-Appellants.

Appeal from the United States District Court for the Southern District of New York.

Appendix B—Judgment of the United States Court of Appeals

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgments of said District Court be and they hereby are affirmed.

[seal]

A true copy,
A. Daniel Fusaro
Clerk

A. Daniel Fusaro
Clerk

APPENDIX C

Opinion of the United States Court of Appeals Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

RAYMOND MARQUEZ, a/k/a "Spanish Raymond" and ANTHONY ANGELET and PEDRO RIVERA a/k/a "Pete Russo".

Defendants-Appellants.

A petition for a rehearing together with a motion in the alternative to stay the issuance of the mandate and to continue bail pending application for a writ of certiorari to the Supreme Court of the United States having been filed herein by counsel for the appellant Pedro Rivera,

Upon consideration thereof, it is

Ordered that said petition for rehearing be and it hereby is denied.

Mandate stayed and bail continued subject to the provisions of Rule 41(b), Federal Rules of Appellate Procedure.

TOM C. CLARK
Associate Justice

J. JOSEPH SMITH
Circuit Judge

JOSEPH C. ZAVATT
District Judge

October 29, 1971

APPENDIX D

Excerpt from Appellant's Court of Appeals Brief Regarding Federal Jurisdiction Over Offenses Lacking Significant Federal Nexus

We cannot conclude without commenting upon the overall scheme of the prosecution against the Appellant. The controversy surrounding the offense of conspiracy needs no elaboration. One of the most common arguments levelled against the federal criminal statutes which derive their jurisdiction from the interstate commerce clause of the Constitution is that such acts tend to inject federal jurisdiction into matters which are properly reserved to the states. See, e.g., *Carbo* v. *United States*, 314 F. 2d 718 (9th Cir. 1963); *United States* v. *Corallo*, 281 F. Supp. 24 (S.D.N.Y. 1968). Despite the continued vitality of the federal conspiracy offense and despite recurring rejection of the arguments against interstate commerce—based federal jurisdiction, the instant case demonstrates the need for repeatedly assessing these statutes on an *ad hoc* basis.

Particularly, the Appellant Rivera was apparently involved in a local numbers operation clearly violative of the laws of the State of New York. He was, within that operation, clearly a minor functionary. Raymond and Angelet may theoretically have violated certain laws of New York State (though we are unpersuaded that there was in fact sufficient proof of any violation of New York law).

It is eminently clear, however, that the trip to Puerto Rico was merely fortuitously related to the state offenses. Had Nieves not sent the money to Puerto Rico just days before the December 8th meeting, there could be no pretense of injecting federal jurisdiction into this case. The trip was

Appendix D—Excerpt from Appellant's Court of Appeals Brief Regarding Federal Jurisdiction Over Offenses Lacking Significant Federal Nexus

but an incidental offshoot of the apparent state offense. Clearly, Raymond would not have cared from where Nieves obtained the money with which to repay him.

It was not the purpose of Congress, we believe, to assert federal jurisdiction in such a case. The statute contemplates, properly, a significant relationship between the unlawful activity and the interstate commerce. See *United States* v. *Botticello*, 422 F. 2d 832 (2d Cir. 1970); *United States* v. *Hawthorne*, 356 F. 2d 740 (4th Cir. 1966), cert. denied, 384 U.S. 908 (1966). We do not believe Congress to have contemplated federal jurisdiction over one so far removed from the interstate commerce as the Appellant herein.

Indeed, as noted earlier, it is only by virtue of the vicarious liability imposed by the conspiracy charge that Appellant can be connected in any manner with the purported violation of 18 USC §1952. This makes even more manifest the lack of any clear nexus between the Appellant and the interstate travel of Nieves. In light of the tenuous evidence tending to inculpate Appellant in a conspiracy to violate that statute, we are forced to conclude that the only reason it was alleged was to inject into the case federal jurisdiction where such jurisdiction would otherwise not exist. In this regard, we respectfully remind this Honorable Court of the Supreme Court's caveat that it would "view with disfavor attempts to broaden the already pervasive and widesweeping nets of conspiracy prosecutions." *Grunewald* v. *United States*, 353 U.S. 391, 404, 77 S. Ct. 963, 1 L.Ed. 2d 931 (1957).

Appendix D—Excerpt from Appellant's Court of Appeals Brief Regarding Federal Jurisdiction Over Offenses Lacking Significant Federal Nexus

Allegations of conspiracy must, therefore, be viewed with close scrutiny. So viewed, the charge in the case *sub judice* must fall. To allow the federal authorities to pursue a state prosecution under the guise of a conspiracy charge, merely because they are offended by the actions of a given defendant, is to invite a breakdown of traditionally accepted and proven concepts of federal-state criminal jurisdiction. Pragmatic means of obtaining federal jurisdiction ought not be allowed to serve as a substitute for proof beyond a reasonable doubt.

WHEREFORE, we urge this Honorable Court to set aside Appellant's conviction of the conspiracy charge and, *ergo*, to dismiss the indictment as to all counts.

APPENDIX E

Excerpts from Trial Record

Monserrat—direct

The Court: As best you recall, state everything that was said on this occasion either by you or by Raymond Marquez or Anthony Angelet.

The Witness: Well, when they sent me to look for the money, when they told me to go to Puerto Rico to look for the money, I told them I couldn't go to Puerto Rico because I had my wife in the hospital.

Mr. Lemefsky: Again, if your Honor pleases, I ask that it be stricken out as not responsive. This is the crucial point. It is very germane and we have got to know when he says "they," who did the talking.

The Court: Yes.

When you said "they" told you to go to Puerto Rico, to whom are you referring?

The Witness: Well, it was Raymond who told me so.

And then I told him that I couldn't go because my wife was in the hospital.

The Court: Was Angelet present when Raymond told you that?

The Witness: Oh, yes.

Monserrat—direct

Q. And did Mr. Angelet say anything when you said that to Raymond? A. Well, he told me, when I told him that I could not go get the money, he told me to go immediately to look for the money.

Rivera—cross

Prosecutor: In fact, according to your testimony, Angelet was never in the room when anything was said about going to Puerto Rico to get money, is that correct?

Rivera: In the room, it was never said to go to Puerto Rico.

Q. It was never said? A. No.

Q. Well, Papo did say, "My money is in Puerto Rico," didn't he? A. That's what Papo said, his money was in Puerto Rico.

Q. And Raymond said, "I don't care where it is, get it," is that correct? A. That's correct.

Q. But by this time Angelet had left? A. Right after that.

Q. Right after that? He was there when Raymond said, "I don't care where it is, go," is that right?

Mr. Rosner: I object. He didn't say "go." He said, "I don't care where it is. Just get my money."

Mr. Fitzpatrick: I apologize for that.